Supreme Court, U. S.
FILED
APR 24 1980
MICHAEL RODAK, JR., CLERK

in the

Supreme Court
of the
United States

OCTOBER TERM, 1979

No. 79-1682

DOMINIC ZECCOLA,

Petitioner,

vs.

RALPH P. EZZO, individually and
EZZO & GAREL, P.A.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL OF FLORIDA THIRD DISTRICT

Dominic Zeccola
110 N.E. 9 Court
Homestead, Florida 33030
In Proper Person

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The petitioner, Dominic Zeccola, prays that a writ of certiorari issue to review the judgment and decision of the District Court of Appeal of Florida, Third District,

which judgment became final when the Supreme Court of Florida denied further appellate review.

OPINIONS OF THE COURTS BELOW

The final judgment of the Circuit Court of the Eleventh Judicial Circuit in and for Dade County, Florida, is not reported and appears in Appendix "A".

The opinion of the District Court of Appeal of Florida, Third District, is reported at 370 So.2d 38 and appears at Appendix "B". The Supreme Court of Florida denied the petitioner's petition for a writ of certiorari on January 25, 1980 (see Appendix "C").

JURISDICTION

The order of the Supreme Court of Florida denying petitioner's petition for writ of certiorari was entered on January 25, 1980 (App. C).

The jurisdiction of this Court is invoked under the provisions of Title 28, United States Code §1257(3).

QUESTION INVOLVED

Whether the petitioner was denied his Fourteenth Amendment Right to Due Process of Law where his cause of action was summarily determined on a question of fact.

CONSTITUTIONAL AND STATUTORY PROVISIONS

Amendment 14, Constitution of the United States reads:

> ". . . nor shall any State deprive any person of life, liberty, or property, without due process of law; . . ."

Section 95.11(4)(a), Florida Statutes, reads:

> "(4) Within two years. —
>
> "(a) An action for professional malpractice, other than medical malpractice, whether founded on contract or tort; provided that the period of limitations shall run from the time the cause of action is discovered or should have been discovered with the exercise of due diligence; provided, however, that the limitation of actions herein for professional malpractice shall be limited to persons in privity with the professional."

STATEMENT OF THE CASE

On April 14, 1971, petitioner alleged that he employed respondent, Ezzo and respondents, Ezzo and Garel, P.A., as attorneys to represent him in an action against *Edwards Produce Company* for damages for personal injuries (Amended Complaint for Damages in Professional Malpractice Action). Instead, respondent filed suit against *Miami Produce Company* (Ibid).

Subsequently, respondents filed suit against the appropriate defendants, Edwards Produce Company on April 23, 1975, 17 days after the Statute of Limitations had run on the cause of action (Ibid).

Petitioner filed his complaint for professional malpractice against the respondents on *August 18, 1977.*

Respondents' answer alleged that petitioner advised them that the proper party to sue was *Miami Produce Company.* Further respondents raised the affirmative defense that the action is barred by the statute of limitations (Respondents' Answer and Affirmative Defenses).

In petitioner's motion for partial summary judgment he stated that the first indication of any problem was in a letter from Ezzo dated *October 22, 1975,* which letter indicated that the trial judge entered a ruling dismissing the case on July 18, 1975. In addition, the letter reflects that Ezzo filed a motion to reinstate the action on July 25, 1975, which motion was heard on October 15, 1975, and denied.

Petitioner filed his first affidavit that not until he received a second letter dated November 5, 1975, from Ezzo, did he have any definite knowledge concerning the final dismissal of his case by reason of respondents filing the action against the wrong party.

In respondents' motion for summary judgment supported by Ezzo's affidavit, the latter stated that on July 18, 1975, he telephoned the petitioner and told him that the suit against Edwards Produce Company had

been dismissed because the statute of limitations had run on the action. Ezzo admitted the wrong party had been sued.

Respondents' motion for summary judgment alleged that the petitioner had knowledge of respondents' filing of the suit against the wrong party as of *July 18, 1975,* more than two years before the date of the filing of the malpractice action (A 21).

Respondents (in a second motion to strike petitioner's affidavit) stated that although petitioner's affidavit filed on December 21, 1978, appears to establish *October 22, 1975,* as the time petitioner was first advised of the running of the Statute of Limitations, the petitioner testified repeatedly in his deposition taken January 18, 1978, that he could not recall when he was advised of the running of the Statute of Limitations.

Then, Ezzo filed a second affidavit in support of his motion for summary judgment swearing that petitioner advised him that the place where he slipped and fell was the Miami Produce Company, and that company was to be sued for his injuries.

Ezzo's own Client Interview Sheet attached to respondents' notice of filing exhibits reflects that the name and address of the defendant was *"Edwards Produce"* with the permanent address being *"Miami Produce".*

Petitioner filed a second affidavit which stated that he always identified the company to be sued as Edwards

Produce Company and the only reference to Miami Produce was that the latter (Miami Produce Mart) was the location of Edwards Produce Company.

Petitioner swore also that at no time prior to *October 22, 1978*, did Ezzo tell him that the case against Edwards Produce Company was finally terminated.

The Court in granting the summary final judgment for respondents on the ground that the petitioner's malpractice suit against his attorneys was not filed within the two year Statute of Limitations, stated:

> "That the plaintiff being unable to create an issue of fact through his own testimony, as to when he was first advised of the potential malpractice claim against the defendant, and since the defendant has testified that he first advised MR. ZECCOLA in July, 1975, that the wrong party had been sued, this court finds that MR. ZECCOLA knew or should have known in July, 1975, that he had a potential claim for malpractice against the defendants herein."

In turn, the District Court of Appeal found that the petitioner had actual knowledge of the basis of his claim for legal malpractice more than two years before the action was filed — there being no genuine issue of material fact (App. B).

The Supreme Court of Florida denied petitioner's petition for a writ of certiorari (App. C).

REASONS FOR GRANTING THE WRIT

> Petitioner was denied a most fundamental requisite of due process, i.e., the opportunity to be heard on the merits where the cause was summarily determined where a question of fact existed as to when petitioner had actual notice of respondent's legal malpractice.

Respondent, Ezzo's affidavit was to the effect that he notified the petitioner on *July 18, 1975*, that the suit against Edwards Produce Company had been dismissed because the Statute of Limitations had run, thus making any action for professional malpractice due to be filed within two years from July 18, 1975. Section 94.11(4)(a), Florida Statutes.

On the other hand, petitioner could not remember any telephone call from Ezzo. Although the petitioner testified in a deposition that he could not recall when he was first advised that the Statute of Limitations had run on his action against Edwards Produce Company, his second affidavit reflected that Ezzo at no time prior to October 22, 1975 (the date of Ezzo's first letter advising petitioner of the Statute of Limitations problem) told him that the case against Edwards Produce Company was terminated.

Obviously a genuine issue of material fact existed as to when respondent's act of negligence became known to the petitioner, which issue is a question of fact to be determined by a jury and not by a trial court in a summary procedure.

Certainly, a jury of reasonable men hearing Ezzo testify that petitioner told him that the injury had occurred at Miami Produce Company and that company was the one to sue could disbelieve Ezzo based upon the latter's own client interview sheet reflecting that the defendant's name was *Edwards Produce.*

In similar manner a jury of reasonable men could choose to disbelieve Ezzo's statement that he first gave notice to petitioner by telephone on *July 18, 1975,* that the statute of limitations had run on his claim.

This Court has recognized the right to be heard in judicial proceedings as "one of the most fundamental requisites of due process." The due process clause of the Fourteenth Amendment was severely violated in this case as issues of fact are never to be determined or resolved by the trial court (only questions of law).

Since petitioner was unconstitutionally denied his right to have his action determined by the jury, it becomes necessary for this Court to exercise its jurisdiction so that every state court adheres to this fundamental concept.

CONCLUSION

Accordingly, the petition for writ of certiorari to the District Court of Appeal of Florida, Third District, should be granted.

Respectfully submitted,

DOMINIC ZECCOLA
110 N.E. 9 Court
Homestead, Florida 33030
In Proper Person

APPENDIX A

IN THE CIRCUIT COURT OF THE 11TH JUDICIAL CIRCUIT IN AND FOR DADE COUNTY, FLORIDA
GENERAL JURISDICTION DIVISION
Case Number: 77-23065 Div. 04

DOMINICK J. ZECCOLA,

Plaintiff,

-v-

RALPH P. EZZO, individually and
EZZO & GAREL, P.A.,

Defendants.

FINAL SUMMARY JUDGMENT

THIS CAUSE coming to be heard upon motion of the defendant, RALPH P. EZZO, and EZZO & GAREL, P.A., for summary judgment, and this court having the argument thereon and being otherwise duly advised on the premises, it is

ORDERED & ADJUDGED that:

1. There are no material issues of fact as to the date that the plaintiff DOMINICK J. ZECCOLA was first advised that he had a potential malpractice claim against the defendant herein.

2. That the plaintiff being unable to create an issue of fact through his own testimony, as to when he

was first advised of the potential malpractice claim against the defendant, and since the defendant has testified that he first advised MR. ZECCOLA in July, 1975, that the wrong party had been sued, this court finds that MR. ZECCOLA knew or should have known in July, 1975, that he had a potential claim for malpractice against the defendants herein.

3. That as a matter of law, the plaintiff's law suit for professional malpractice against the defendant herein, was not filed within the two-year Statute of Limitations provided therefore, and the defendant's motion for summary judgment be and the same hereby is granted.

4. Motion for summary judgment made on behalf of the plaintiff be and same hereby is denied.

DONE & ORDERED in Chambers, this 13 day of April, 1978.

HERBERT M. KLEIN
CIRCUIT COURT JUDGE

APPENDIX B

IN THE DISTRICT COURT OF APPEAL
OF FLORIDA

THIRD DISTRICT

JANUARY TERM, A.D. 1979

DOMINIC ZECCOLA,
Appellant,

vs.

RALPH P. EZZO, individually and
EZZO & GAREL, P.A.,
Appellees.

CASE NO. 78-957

Opinion filed April 10, 1979.

An Appeal from the Circuit Court for Dade County, Herbert M. Klein, Judge.

Cagle & Rice and Lawrence C. Rice, for appellant.

Wicker, Smith, Blomquist, Davant, McMath, Tutan & O'Hara and Richard A. Sherman, for appellees.

Before BARKDULL, HUBBART and SCHWARTZ, JJ.

PER CURIAM.

The defendant conclusively established, without genuine issue of material fact, that the plaintiff was on actual notice of the basis of his claim for legal malpractice more than two years before the present action was filed. The summary judgment entered below for the defendant because of the bar of the statute of limitations, Section 95.11(4)(a), Florida Statutes (1975), is therefore affirmed. See *Robinson v. Sparer*, 365 So.2d 438 (Fla. 3d DCA 1978); *Steiner v. Ciba-Geigy Corp.*, 364 So.2d 47 (Fla. 3d DCA 1978); compare *Green v. Bartel*, 365 So.2d 785 (Fla. 3d DCA 1978); *Rosen v. Sparber*, ____ So.2d ____ (Fla. 3d DCA 1978) (Case no. 78-496, opinion filed, December 5, 1978).

Affirmed.

APPENDIX C

SUPREME COURT OF FLORIDA

FRIDAY, JANUARY 25, 1980

DOMINIC ZECCOLA,

Petitioner,

vs.

RALPH P. EZZO, ETC.,

Respondent.

CASE NO. 57,102

District Court of Appeal,
Third District
78-957

This cause having heretofore been submitted to the Court on jurisdictional briefs and portions of the record deemed necessary to reflect jurisdiction under Fla. R. App. P. 9.120, and it appearing to the Court that it is without jurisdiction, it is ordered that certiorari is denied.

No Motion for Rehearing will be entertained by the Court. See Fla. R. App. P. 9.330(d).

ADKINS, ACTING C.J., BOYD, OVERTON, SUNDBERG and ALDERMAN, JJ., Concur